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Nix v. Whiteside: The Lawyer's Role In Response to Perjury

James R. McCall
UC Hastings College of the Law, mccallj@uchastings.edu

Author: James R. McCall

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ARTICLES

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By JAMES R. MCCALL*

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Introduction

Few appellate decisions dealing with lawyers' ethics have captured the attention of the profession and the general public as did *Nix v. White-*

* Professor of Law, University of California, Hastings College of the Law; B.A. 1958 Pomona College; J.D. 1962, Harvard Law School.

side.[1] The case focused upon a very small portion of the conversation between a court-appointed criminal defense attorney and his client during a trial preparation conference. Early in the conference, the client announced the intention to give certain testimony his attorney believed would be perjurious. The attorney reacted by persuading the defendant not to give the suspect testimony. Subsequently, the defendant testified at trial in a manner the attorney considered truthful, and was convicted of second-degree murder.

The defendant then dismissed his attorney, obtained new counsel and claimed that his first attorney did not provide the effective assistance of counsel to which the defendant was constitutionally entitled under the Sixth Amendment.[2] Over the course of several years the defendant pressed his claim before all available state and federal courts, culminating in the United States Supreme Court decision of *Nix v. Whiteside*, rendered on February 26, 1986.[3]

As is the case with almost all Supreme Court decisions, the *Nix* decision addressed issues of constitutional doctrine, three of which are of major importance. First, what is the proper standard for appellate reversal of a conviction attacked on the ground that the defendant and defense

1. 106 S. Ct. 988 (1986). The Supreme Court's decision is the last in a series of reported opinions beginning with the Iowa Supreme Court's affirmance of defendant Whiteside's second-degree murder conviction in State v. Whiteside, 272 N.W.2d 468 (Iowa 1978). The defendant sought but was denied habeas corpus relief in Whiteside v. Scurr, No. Civil-81-246-C, slip op., (S.D. Iowa Dec. 7, 1982). The Eighth Circuit reversed the District Court in Whiteside v. Scurr, 744 F.2d 1323, *reh'g denied en banc,* 750 F.2d 713 (8th Cir. 1984). The Supreme Court reversed the Eighth Circuit in Nix v. Whiteside. To avoid confusion, this Article will refer to the Supreme Court opinion as Nix v. Whiteside, or more simply, as *Nix*, and the Eighth Circuit panel and en banc hearing opinions will always be referred to as Whiteside v. Scurr.

2. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy . . . the assistance of Counsel for his defence."). This right was made applicable to state criminal proceedings in Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* Argersinger v. Hamlin, 407 U.S. 25 (1972).

The standard for evaluating a Sixth Amendment ineffectiveness claim is found in Strickland v. Washington, 466 U.S. 668 (1984). The focus of the *Strickland* text is whether "[C]ounsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. The defendant must show that counsel's performance was deficient and that this deficiency prejudiced the defense. *Strickland* stressed that great deference must be given to counsel's performance:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

Id. at 689.

3. 106 S. Ct. 988 (1986).

counsel disagreed over tactics at the trial? Second, does the defendant in a criminal action have the right to commit perjury when offering testimony in his or her defense? Third, what obligation does a criminal defense attorney have to participate passively in perjury by the defendant?[4]

The practical significance of the resolution of these issues lies in the directions given to the organized bar and to the courts that control the professional behavior of attorneys through promulgation and enforcement of codes or standards of professional conduct. These codes invariably contain both general prohibitions and more detailed procedures that attorneys representing criminal defendants must follow. Four important and previously unresolved procedural questions commonly addressed in codes of attorney conduct are either directly affected by or answered in *Nix*. The answers to these procedural questions, which all relate to the attorney-client relationship, are of great practical significance to defendants in criminal actions, their attorneys, the administration of criminal justice and the legal profession.

This Article considers the *Nix* decision analytically and from a historical perspective. Since the decision takes a clear position on some of the most controversial questions about the attorney-client relationship of a criminal defense lawyer, the historical context of these issues and the basic controversy over the proper role of criminal defense attorneys is explored. This exploration follows a summary of the facts and proceedings involved in the prosecution of Emmanuel Whiteside. In the author's view, the constitutional issues and the procedural questions relating to the attorney-client relationship are ultimately determined by the Supreme Court's conception of the proper role of a defense lawyer in a criminal case. For this reason, the two competing concepts of the role of the criminal defense lawyer are discussed, and the court decisions and professional standards of conduct that embody the two role concepts are reviewed.

I. Lawyer Roles and the *Nix v. Whiteside* Litigation

A. Conflicting Criminal Defense Lawyer Roles

The decisions on points of consititutional doctrine in *Nix* are based upon a clear conception of the proper role for an attorney to assume when serving as counsel for a citizen accused of a crime. This choice of the proper role for a lawyer is explicit and consistent in the majority opinion in *Nix*, and it should conclude a period of approximately ten

4. The court's position on the three issues is discussed infra in text accompanying notes 141-167.

years during which there has been no clear professional consensus on the proper role of the criminal defense attorney. During this period the issue has produced disarray among appellate courts and in professional ethical codes, as well as considerable debate among academic lawyers on the subject.[5]

One conception of the proper role for a criminal defense counsel is that of "officer of the court". Although the duties of such an "officer" have never been enumerated in detail, standards of professional conduct and decisions of the Supreme Court contain references to this role.[6] In the context of client perjury, one duty of an officer of the court would seem to be to take all steps necessary to prevent perjury from occurring in the court and, if perjury has occurred, to take all steps necessary to negate its effect.

While the officer of the court role has frequently been mentioned with approval, it is clear that trial attorneys are advocates for their clients, and this role requires significant loyalty to the client whose cause is being advocated. If the concept of the advocate role is pushed to an extreme, it can be conceived of as an "alter ego advocate", meaning an advocate who uses his or her skills in the best interests of, and as directed by, the client, without consideration for any duties other than to avoid personally breaking the law. The "alter ego advocate" role is not only morally defensible, it is seen by its adherents as necessary in order to adequately secure the rights and liberties of all citizens against government oppression. There is also significant evidence that it is the role that is in fact actually adopted by many criminal defense attorneys.[7]

The most eloquent voice advocating the alter ego advocate role for criminal defense attorneys has been that of Professor Monroe Freedman.[8] Freedman's position on client perjury is both provocative and

5. The conflict in court decisions is discussed *infra* in text accompanying notes 125-134. The confusion in the standards of ethics of the legal profession is discussed *infra* in text accompanying notes 95-112. The academic debate is briefly described *infra* in text accompanying notes 8-14.

6. *See, e.g.,* A.B.A. STANDARDS FOR CRIMINAL JUSTICE, Standard 4-7.1(a) (1980); *see also In re* Griffiths, 413 U.S. 717, 728-33 (1972) ("The role of a lawyer as an officer of the court predates the Constitution; it was carried over from the English system and became firmly embedded in our tradition."); New York *ex. rel.* Karlin v. Culkin, 248 N.Y. 465, 472-73, 162 N.E. 487, 489-90 (1928).

7. *See infra* note 13.

8. Professor Freedman first published his views on the proper role of a criminal defense lawyer in Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (hereinafter cited as *The Three Hardest Questions*). He has restated his views in Freedman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION 26 (1975) (hereinafter cited as *Lawyer's Trilemma*), and, finally, in FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM (1975) Chapter 3.

consistent with what he views as the actual and necessary practice of defense counsel in criminal cases. His position is that an attorney should put a client who intends to commit perjury on the stand, question the client in the ordinary manner, and use the perjured testimony as if it were true evidence for all purposes, including summation argument to the judge or jury.[9] In Professor Freedman's view the conduct he advocates necessarily flows from a trial lawyer's absolute duties of confidentiality and diligence in investigating the facts of a client's case.[10]

It should be stressed that the alter ego advocate role does not countenance subornation of perjury or similar forms of law breaking by the attorney.[11] On the contrary, the alter ego advocate as conceived by Freedman has a duty to counsel against any unlawful activity, including perjury.[12] However, an explanation of the law of false testimony will come as no surprise to many defendants in criminal actions, and such explanation may do little to dissuade a perjury-intending client from doing as he or she intends. Thus, although the alter ego advocate role does not authorize unlawful conduct on the part of the attorney, it requires passive participation in the perjury by the attorney if the client maintains an intent to commit perjury. The alter ego advocate has no duty to prevent or to report the client's perjury.[13]

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9. *Lawyer's Trilemma, supra* note 8, at 28.

10. Professor Freedman's view of what this author has termed the "alter ego advocate" role for the criminal defense lawyer has generated voluminous commentary. *See, e.g.,* Dash, *The Emerging Role and Function of the Criminal Defense Lawyer*, 47 N.C.L. REV. 598, 630-32 (1969); Selinger, *The Perry Mason Perspective and Others: A Critique of Reductionist Thinking About the Ethics of Untruthful Practices by Lawyers for "Innocent" Defendants*, 6 HOFSTRA L. REV. 631 (1978); and Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665 (1978).

11. Subornation of perjury has historically involved active inducement of the perjury which goes beyond merely asking the questions that produce the perjured testimony from the witness. *See infra* text accompanying notes 69-76. Professor Freedman has indicated that his alter ego advocate conception of the criminal defense attorney would not permit an attorney to passively participate in perjury by witnesses other than the defendant and perhaps the defendant's spouse or parent. *Lawyer's Trilemma, supra* note 8, at 28.

12. It would appear that between 1966 and 1975, Professor Freedman somewhat altered his position on the question of an attorney's duty to attempt to dissuade the perjury-intending client. In 1966, Professor Freedman explicitly asserted a duty on the part of the criminal defense attorney to attempt to persuade the client to abandon the intent to commit perjury. *See The Three Hardest Questions, supra* note 8, at 1478 n.3. However, in 1975 Professor Freedman was less concerned with actively dissuading the testimony: "In my opinion, the attorney's obligation in such a situation would be to advise the client that the proposed testimony is unlawful, but to proceed in the normal fashion in presenting the testimony and arguing the case to the jury if the client makes the decision to go forward." *The Lawyer's Trilemma, supra* note 8, at 28.

13. Regardless of one's view of the merits of the alter ego advocate position, it is impossible not to be impressed with the value of Professor Freedman's contribution to the debate over the proper role of a criminal defense attorney by articulating his choice for that role in the

In contrast, the officer of the court role for a criminal defense attorney includes, at a minimum, a duty to prevent perjury from occurring in a court proceeding if the acts of prevention sacrifice no lawful interest of the client. This minimum duty of a court officer would call for strong attempts to dissuade the client from committing perjury. Beyond this, it can be argued that a court officer should have an obligation to prevent perjury by a number of additional procedures, ranging from withdrawal from representation through non-participation in the giving of any false testimony, to reporting a client's perjury or intended perjury to the court or prosecutorial authorities. The academic figure most frequently associated with the officer of the court role in relation to client perjury is Professor Charles Wolfram. The association was formed by the publication in 1977 of Professor Wolfram's comprehensive and much cited article on the subject of client perjury. The article, among many things, flatly rejected Professor Freedman's position on the proper response of a criminal defense lawyer to intended client perjury.[14]

Although the proper lawyer role concept may seem a rather academic topic, the choice between the two competing concepts has great practical significance. The various courts that reviewed the prosecution of Clarence Whiteside made, sub silentio, conflicting choices on the proper role conception of a criminal defense lawyer, and from those choices flowed conflicting decisions on the validity of the judgment in the case.

B. The Record Facts

The basic facts regarding the killing of Calvin Love were never in substantial dispute.[15] In the early morning of February 8, 1977, Emmanuel Whiteside and two companions, Derrick Doolin and Terry Fowler,

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academic literature. His contribution, it should be noted, is not only controversial but was made at not a little cost to him personally in time and tribulation. Professor Freedman reports that several members of the Washington D.C. bar urged that he be suspended or disbarred for his views. After four months of proceedings, the charges were dropped. *See The Three Hardest Questions, supra* note 8, at 1469 n.1. In addition, it is Professor Freedman's view, and this author has no reason to doubt him on the point, that many practitioners conduct their defense of defendants in criminal actions in accordance with the dictates of the alter ego advocate role model. *See* Lefstein, *supra* note 10, at 675 n.33 for discussion of statistical surveys supporting Professor Freedman on this point.

14. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 848, 853 (1977). Professor Wolfram argues that reporting of (the proposed) perjury of the client to the court is "[t]he only workable approach." *Id.* at 853.

15. The following description draws from the Eighth Circuit opinion, 744 F.2d 1323, the Supreme Court opinion, 106 S. Ct. 988 and the trial record found at Appendix to Petition for Writ of Certiorari, Nix v. Whiteside, 105 S. Ct. 2016 (1985) (as reported in 23 AM CRIM. L. REV. 2 n.17 (1986)) (hereinafter cited as Writ of Cert. Petition).

went to Love's apartment. Their intention was to claim as their own a quantity of marijuana held by Love. At the apartment, they found Love in the company of his girlfriend, Kathy Sauer. An argument over who had the right to the marijuana ensued. Love became particularly incensed at Doolin and also appeared to threaten Whiteside, when the latter attempted to intervene. Love asked Sauer to get his "piece"—street argot for pistol—and reached toward the pillow on his bed. At that point Whiteside fatally stabbed Love. The time was approximately 2:00 A.M.

Love had a reputation as a belligerent, gun-owning ex-convict. Whiteside had been in jail with Love in the past and thought the latter a dangerous character. Whiteside at all times maintained that he was in fear of his life at the time he stabbed Love, and he so testified at the trial. Although the state charged Whiteside with first degree murder, the jury chose to convict him of the lesser charge of murder in the second degree. The trial court judge sentenced Whiteside to forty years imprisonment.

While the jury was deliberating, Whiteside responded to a question from the Judge by stating that he was satisfied with the representation in the case he had received from his attorneys, Gary Robinson and Robinson's assistant, Donna Paulson. Following the verdict, Whiteside, represented by new counsel, moved for a new trial on the ground, among others, that he had not received effective assistance from Robinson.[16]

At the hearing on the motion, Whiteside testified that he had given Robinson a written statement when the latter had been appointed to be his counsel. The statement contained the sentence that Love had reached under his pillow and pulled a pistol out from under it just before Whiteside stabbed him to death. Whiteside testified that he continued to talk to Robinson about the need for Robinson to find the pistol so that it could be produced at trial during the weeks between Robinson's appointment and the commencement of the trial.

Whiteside was somewhat vague in his testimony concerning a crucial conference with Robinson some ten days before trial. At that conference both Robinson and Paulson were present, and Whiteside revealed his intention to them that he would testify that he had seen a gun in Love's hand just before he had, in self-defense, stabbed Love.[17]

16. Paulson, who functioned as Robinson's assistant during trial preparation and at trial, did not have a significant role in any of the events that are relevant to the issues raised by Whiteside's claim that he did not receive effective assistance of counsel. However, she did testify concerning the conferences at which she was present, including the conference some ten days before trial that is of crucial importance in considering Whiteside's claim. *Cf. infra* text accompanying note 24.

17. Writ of Cert. Petition, *supra* note 15, at A.70-72.

Although Whiteside had no specific recollection of Robinson's response, the defendant did recall that he "got the impression" that if he testified that he had seen a gun in Love's hand prior to the stabbing, Robinson would back out of the representation. It was because of this impression that Whiteside elected not to state in his testimony that he had seen a gun in Love's hand. Whiteside could remember no other threats or admonitions that Robinson had made during the conference.

Robinson's testimony gave a more complete, and significantly different, narrative of the events in question. Robinson recalled that he had been appointed by the court to represent Whiteside only after the latter had been unable to obtain the court appointment of the attorney of his choice.[18] Before Robinson, another attorney was appointed by the court for Whiteside. Whiteside rejected this appointee, however, because the attorney had previously worked as a County Prosecutor and the defendant felt unable to trust him. The trial court then appointed Gary Robinson to represent Whiteside.

Robinson recalled the first conference he had with Whiteside and that the latter had given him a five page personal statement describing the killing. Whiteside had written in the statement that he had seen a pistol in Love's hand just prior to stabbing him.[19] The written statement had been prepared by Whiteside for his first attorney, and Robinson's impression was that his client had not been serious about seeing a pistol in Love's hand when he wrote the statement. Robinson thereafter searched Love's apartment for between 30 to 45 minutes, but found no pistol.[20] He questioned the three witnesses to the killing, Doolin, Fowler, and Sauer. All of them said that Love had not reached for a pistol prior to the killing and that they had seen no pistol in the room at any time during the incident. Robinson questioned the police officer who arrived at the crime scene within fifteen minutes after the killing and who immediately searched the premises. That officer had found no pistol or other

18. The attorney that Whiteside wished to have represent him was Thomas Koehler. After Koehler had held several conferences with Whiteside and had begun work on the case, a conflict of interest developed in the sense that one of the attorneys working in Koehler's office was appointed counsel for codefendant Doolin. Writ of Cert. Petition, *supra* note 15, at A.46-48. Under Disciplinary Rule 5-105(D) of the ABA Code of Professional Responsibility, if an attorney would be disqualified from representing two clients at the same time, the two clients cannot be represented by *any two* attorneys in the same law office, and one of the two clients must seek an attorney in a different law firm. Defendants Whiteside and Doolin could reasonably be predicted to have a conflict of interest at some time in the proceeding, and the existence of a potential conflict has been held sufficient to trigger disqualification. *See* Cinema Five, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) (establishing that the law of disqualification of counsel will follow the same principle as DR 5-105(D)).

19. *See* Writ. of Cert Petition, *supra* note 15, at A.76-78.

20. *Id.* at A.80.

weapon at the scene.[21] On the basis of these investigations and searches, Robinson concluded that there was no gun in the apartment and that Love neither had a gun in his hand nor had been reaching for one when Whiteside stabbed him.[22] This conclusion was supported, in Robinson's mind, by the fact that during his twenty-three conferences with Whiteside over the sixty-nine day period between his appointment and the trial, Whiteside did not mention the prospect of testifying that he had seen a gun in Love's hand until the conference, at which Paulson was also present, approximately ten days before trial.[23]

The purpose of the conference was to discuss a recently offered plea bargain and to review Whiteside's testimony. As Robinson recalled it, during the conference Whiteside for the first time mentioned to either Robinson or Paulson that he had seen something "metallic" in Love's hand just before stabbing him. When Paulson asked Whiteside about the alteration in his testimony, Whiteside expressed concern that the success of his self-defense claim depended on the jury believing Love had had a pistol. He mentioned that in the successful defense of an acquaintance's "case there was a gun. If I don't say I saw a gun I'm dead."[24]

Robinson testified that he responded by explaining, as he had previously, that it was not necessary that Love actually had a gun in his hand in order for a self-defense claim to be recognized; it was only necessary that Whiteside believed that Love had a gun and was in the act of reaching for it. Robinson further explained that for Whiteside to testify that he had seen a gun would be perjury, since Whiteside had not mentioned seeing a gun before this, and was seeking to change his story now only out of a mistaken view of the requirements for a self-defense claim. Robinson further recalled telling Whiteside that neither he nor Paulson, as officers of the court, could ask a client a question on the witness stand with the expectation that the client would answer falsely. If Whiteside persisted in his intention to testify falsely, Robinson told him that his attorneys would seek to withdraw, and if Whiteside testified as per his expressed intention, his attorneys would be duty-bound to tell the judge that they believed their client was committing perjury. Robinson testified that he gave a final warning to Whiteside to dissuade his client from perjury—if the intended perjury was committed he "would probably be allowed to attempt to impeach that particular testimony."[25] According

21. *Id.* at A.82.
22. *Id.* at A.78.
23. *Id.* at A.77.
24. Nix v. Whiteside, 106 S. Ct at 991.
25. *See* Writ of Cert. Petition, *supra* note 15, at A.85, A.87.

to Robinson, Whiteside never again mentioned seeing a gun or anything metallic in Love's hand prior to the stabbing.[26]

During the defendant's testimony at trial, Robinson asked Whiteside if he thought that Love had a gun at the time he stabbed him, but Robinson did not ask his client if he saw a gun or anything in Love's hand. On cross-examination, Whiteside was asked if he had seen a gun at the time of the stabbing, and he answered that he had not. In Robinson's opinion, the defendant's decision not to testify that he had seen a gun was the result of Robinson's warning that he would inform the judge of his belief that such testimony was perjurious, if it was given on the stand.[27]

The trial court believed the testimony of Robinson, which was corroborated by testimony from Paulson, that there had been no ineffective assistance of counsel.[28] The Iowa Supreme Court reviewed the record of the trial and the hearing on the mistrial motion and held that there had been no error or deprivation of Whiteside's constitutional rights. The opinion of the court commended both Robinson and Paulson "for the high ethical manner in which this matter was handled."[29]

Approximately three years later, Whiteside sought a writ of habeas corpus from a federal district court on the ground of ineffective assistance of counsel. In a short opinion, the District Court stated that a defendant has no right to the assistance of counsel in committing perjury and denied the writ.[30] Whiteside appealed the ruling to the Eighth Circuit.

C. The Eighth Circuit *Whiteside v. Scurr* Decision

The Eighth Circuit reversed the District Court and ordered that the writ of habeas corpus be granted in *Whiteside v. Scurr*.[31] Although there had been no dissent from the initial opinion, the circuit was sharply divided in reaching a decision to deny a petition for rehearing en banc. In its opinion, the court summarized the pertinent facts, stating that Robinson had "threatened" to withdraw, inform the court and testify against the defendant in the event that Whiteside did not change his intention to

26. *Id.* at A.89.
27. *Id.* at A.88-89.
28. *Nix*, 106 S. Ct. at 992.
29. State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978).
30. Whiteside v. Scurr, No. Civil-81-246-C, slip op. (S.D. Iowa Dec. 7, 1982).
31. Whiteside v. Scurr, 744 F.2d 1323 (8th Cir.), *reh'g denied*, 750 F.2d 713 (8th Cir. 1984), *cert. granted sub nom.* Nix v. Whiteside, 105 S. Ct. 2016 (1985). As stated *supra* note 1, the Supreme Court opinion will be referred to as "*Nix*"; the Eighth Circuit opinions as "Whiteside v. Scurr".

testify that he had seen something metallic in Love's hand immediately before the stabbing. While the Eighth Circuit might perceive Robinson's warnings as threats, counsel for Scurr, the warden of Whiteside's prison, chose to characterize Robinson's words on these points as "admonitions".[32]

The court complimented Robinson for his efforts to act in accordance with the accepted ethics of the legal profession. However, the court's analysis of the issues began by noting that, while Robinson's actions may have been in part required by the guidelines of the bar, such guidelines are not superior to the dictates of the United States Constitution.[33] According to the Eighth Circuit, two of Whiteside's constitutional rights were deemed abridged by Robinson's conduct. The first was the right to effective assistance of counsel in meeting a criminal prosecution. The second was the right implicitly contained in the Due Process Clause to testify in his own defense.[34] Whiteside was entitled to protection of these rights despite the fact that the court specifically accepted the lower court finding of fact that Robinson was correct in his opinion that Whiteside "would have testified falsely", or "would have committed perjury" but for Robinson's admonition-threats.[35]

Regarding the effectiveness of Robinson's representation, the court stated that his actions, "in particular the threat to testify against [Whiteside], indicate that a conflict of interest had developed."[36] Even though this conflict was over the client's admitted intent to commit perjury, counsel had thereby "become a potential adversary and ceased to serve as

32. *Compare* Whiteside v. Scurr, 744 F.2d at 1329 ("Counsel's actions, in particular the *threat* to testify against appellant, indicate that a conflict of interest had developed."); Whiteside v. Scurr, 750 F.2d at 714 (denying rehearing) ("The lawyer who discloses confidential communications or who *threatens* to do so . . . has become an adversary to the interests of his or her Client.") (emphasis added); *with* Appel and McGrane, *Nix v. Whiteside: Client Perjury and the Criminal Justice System: The State's Position*, 23 AM. CRIM. L. REV. 19, 40 ("The only impact of the *admonitions* . . . was the defeat of the proposed perjury plan.") (emphasis added). Also note the view of Fagg, J. dissenting from the Circuit's denial of a rehearing petition: "[T]he panel analyzed the lawyer's strongly worded *admonition* from a theoretical viewpoint without taking into account what actually happened." 750 F.2d at 718 (emphasis added).

33. Whiteside v. Scurr at 1327-28. Later the court notes that Robinson's statement that he would testify against Whiteside is *not* specifically required or even authorized by the American Bar Association's Model Rules or Standards for the Admin. of Criminal Justice. *Id.* at 1331. In point of fact, Robinson's duties under the professional guidelines available to him were fragmentary at the time Whiteside informed him of his intention to commit perjury. The only clear prohibitions were those against the knowing use of perjured testimony and against counseling or assisting in illegal conduct. IOWA P.R. CODE 7-102(A)(4) and (7).

34. Whiteside v. Scurr, 744 F.2d at 1329.

35. *Id.* at 1328.

36. *Id.* at 1329.

a zealous advocate of [Whiteside's] interests."[37] Because he had become a "potential adversary", Robinson could not render effective assistance of counsel as required by the Sixth Amendment.[38]

As a separate ground for granting the writ of habeas corpus, the court recognized a right of a defendant in a criminal trial to testify in his or her own behalf. This right was seen as implicit in the Fifth Amendment Due Process Clause, and in the more specific rights to meet accusations and present witnesses included in the Sixth Amendment.[39] According to the Eighth Circuit, Whiteside's constitutional right to testify became "impermissably compromised" when Robinson conditioned continued representation and confidentiality upon Whiteside's giving only "restricted" testimony.[40] It is clear from the court's language that "restricted" testimony is testimony which omits perjured statements the client would like to give.

In reversing the District Court, the Eighth Circuit adopted the reversible error standard recently established by the United States Supreme Court in *Strickland v. Washington*.[41] The *Strickland* standard generally requires an appellant to show that but for the acts showing the ineffective assistance of counsel, "the result of the proceeding would have been different."[42] However, the court decided not to demonstrate how that general standard was met in the case before it, because it believed an exception to the general standard was applicable.

The exception recognized in *Strickland* applied to a convicted defendant whose trial attorney was also representing a second client whose legal interests actively conflicted with the defendant's. In an appeal in such cases, the defendant-appellant was held entitled to a limited presumption of prejudice without the specific proof usually required. In the opinion of the court, Robinson's "threat to testify" against Whiteside in the event of the latter's commission of the crime of perjury constituted a "breach of loyalty" against the client. This and the other "threats" made by Robinson served to "undermine the fundamental trust between lawyer and client."[43] For this reason, the court held that Robinson's actions were tantamount to active representation of a second client with legal interests conflicting with those of Whiteside. Therefore, the Eighth Cir-

37. *Id.*
38. *Id.* at 1331.
39. *Id.* at 1329-30.
40. *Id.* at 1329.
41. 466 U.S. 668 (1984).
42. *Id.* at 694; *see also, supra* note 2.
43. Whiteside v. Scurr, 744 F.2d at 1330; *see also, Strickland*, 466 U.S. at 690; United States v. Cronic, 466 U.S. 648 (1984).

cuit held that prejudice requiring a reversal should be conclusively presumed.[44]

The motion for a rehearing produced four opinions and a substantially sharper discussion of the issues.[45] The opinions denying the petition for rehearing strongly asserted that the court's panel opinion had not created or recognized a constitutional right on the part of Whiteside to commit perjury. They stressed that the basis for the decision was simply that Robinson had threatened to testify adversely to his client, and thereby became an ineffective counsel. This act denied Whiteside the right to testify as he wished, and a presumption of reversible prejudice was established because Robinson's act created a serious "conflict of interest" between client and counsel.[46]

The two dissents argued vigorously that no presumptively prejudicial conflict under the *Strickland* precedent arose when counsel simply informed his client of the possible adverse consequences of the client's intended course of illegal conduct. Further, the dissents found no evidence of actual prejudice to Whiteside in Robinson's conduct of the trial. Finally, the dissenters asserted that persuading a client not to commit the crime of perjury, even by "strident" means, should never be considered "inadequate" assistance of counsel, given the duty of the lawyer "as an officer of the court to protect the integrity of our Nation's courts."[47]

D. The Eighth Circuit's Decisions on Procedures and Lawyer Roles

The Eighth Circuit opinion made a silent, but clear, decision about the proper role of a criminal defense lawyer. The role endorsed by the court was clearly that of an alter ego advocate, whose duty of loyalty to the client's purposes and sense of autonomy is such that the attorney ceases to function as an independent participant in the formal or public process of criminal justice adjudication. In short, there was no room, in the Eighth Circuit's view, for a criminal defense lawyer to assume the role of an officer of the court when dealing with a client with a firm intention to commit perjury.

While it may seem too strong to state the Eighth Circuit's model of a properly functioning criminal defense lawyer in such terms, it is the only explanation for the specific rulings of the court. Most pointedly, only the fact that the opinion was premised on the concept of the alter

44. Whiteside v. Scurr, 744 F.2d at 1330.

45. Whiteside v. Scurr, 750 F.2d 713 (8th Cir. 1984) (denying rehearing) (Fagg, J., dissenting).

46. *Id.* at 714, 717 (Lay, J. concurring).

47. *Id.* at 714-16, 717-19. The quoted phrase appears *id.* at 718 (Fagg, J., dissenting).

ego advocate role can explain the court's holding that Robinson, by attempting to dissuade Whiteside from committing perjury, created a conflict as detrimental to the client's interest as would be the case if Robinson represented two criminal defendants with directly conflicting interests in the same trial.

If an attorney's professional obligations to the court and personal desires to avoid becoming passively embroiled in criminal activity cannot be honored without invariably prejudicing the rights of the client, the attorney's obligations and desires are meaningless—he or she must act only to advance the interests of the client in ways that are to be controlled by the client. This dramatic choice of role provides a framework for considering the ethics of trial attorney conduct, and is unmistakably indicated by the court's doctrinal determination on the issue of "conflict" in regard to the proper standard for reversal. Not surprisingly, the "conflict" determination was the most controversial and vulnerable aspect of the Eighth Circuit's decision.[48]

Whiteside v. Scurr raised four major questions of procedure relating to the criminal defense attorney-client relationship. The courts and the profession have been increasingly concerned with these questions, all of which are of great significance in both the administration of criminal justice and the ethics of the legal profession. The Eighth Circuit decision and the *Nix v. Whiteside* decision which reversed it, significantly advance the debate on the four questions and provide a partial resolution of them.[49]

The first question is when does a criminal defense attorney "know" his client intends to commit perjury and thus have a duty to take some type of action to stop client perjury. The second question evolves from the accepted premise that when an attorney knows that his or her client will commit perjury, the attorney has a duty to attempt to dissuade the client from doing so. The question that is naturally presented is what type of admonitions can be used by an attorney to dissuade his client.

The third question also evolves from a widely accepted premise—that an attorney should withdraw from representation of a client who cannot be persuaded to abandon an intention to commit perjury. The unanswered question is what should the attorney do if he or she cannot withdraw from representing the client who intends to give perjurious tes-

48. Indeed, not one member of the United States Supreme Court agreed with the Eighth Circuit on this point. *See infra* text accompanying notes 142-143.

49. The professional and court consideration of the issues is discussed *infra* in text accompanying notes 78-108. The treatment of the specific issues in the *Nix* decision is discussed *infra* in text accompanying notes 168-181.

timony. This question must be answered carefully, especially if the attorney, whose request for withdrawal is denied, will thereby be required to represent the client at the trial at which the client intends to commit the perjury. The fourth, and final, question is what should a lawyer do in the event his or her client commits perjury. This question applies with equal, or at least substantial, force to the attorney who learns of the client's intent to commit perjury and successfully withdraws from representation before the client testifies. To take into account the withdrawn attorney situation, the issue should be phrased as: what are the duties of an attorney who knows that his or her present or former client has committed perjury?

On the first question, the Eighth Circuit accepted the finding of the trial court that Robinson was correct in his belief that Whiteside intended to commit perjury.[50] This finding, which does not provide significant guidance for the profession, was affirmed and slightly expanded upon by the Supreme Court in *Nix*.[51] On the second procedural question, *Whiteside v. Scurr* expressly held that no threat to report the client's intended perjury can be made by counsel in response to the announcement of that intent, and the decision contains language indicating that it is improper to admonish the client that the lawyer will withdraw unless the client changes his intention.[52]

On the third and fourth questions, concerning attorney conduct during continued representation and duty to report perjury, *Whiteside v. Scurr* implies definite answers. Because the court held that a defendant's right to testify requires defense counsel take no action that "restricts" the client's giving of perjury, logic would require the criminal defense attorney to treat perjured testimony as if it were true and take no steps to report perjury by a present or a former client. Otherwise, the attorney's actions would restrict the value of the perjury.[53]

50. Whiteside v. Scurr, 744 F.2d at 1328; *id.* at 714 (denying rehearing).

51. 106 S. Ct. at 997. The determinations on these points by the United States Supreme Court is one of the main subjects addressed *infra* in text accompanying notes 153-156.

52. Whiteside v. Scurr, 744 F.2d at 1329; *id.* at 717 (denying rehearing) (Lay, J., concurring).

53. The views of the Supreme Court on the second, third, and fourth procedural issues are contrary to those of the Eighth Circuit. *See infra* notes 168-181 and accompanying text. It should be noted that four of the Justices who participated in the *Nix* decision objected to the implications in the majority opinion that particular responses on the part of a criminal defense attorney to intended or actual client perjury should be recommended by the United States Supreme Court. The majority's position is clearly that it is proper for the Court to recommend such procedures. *See infra* text accompanying notes 157-166.

E. Summary of the Supreme Court *Nix* Decision

The decision of the United States Supreme Court contained two elaborate opinions: the majority opinion, written by Chief Justice Burger and joined by Justices White, Powell, Rehnquist and O'Connor, and Justice Blackmun's concurring opinion, which was joined by Justices Brennan, Marshall and Stevens.[54] Neither opinion specifically addresses the issue of what is the proper role of a criminal defense attorney, although both indicate the role that the authors deem proper. On the four procedural questions, both opinions, particularly the majority, are informative.

The nine Justices agreed that the Eighth Circuit erred in finding that Whiteside's constitutionally protected rights were prejudiced as a result of Robinson's representation. Thus the lower court decision was reversed unanimously and the writ of habeas corpus denied. However, the Court split sharply over the propriety of deciding whether an attorney should report a client's perjury to the court.[55] The Court's discussion and resolution of the reporting of perjury question is rich in implication.

On the first procedural question, the Court does not offer general guidance to the Bar on when an attorney "knows" that a client intends to commit perjury.[56] Regarding the second and third procedural questions, the Court's approval of Robinson's conduct clearly establishes that the admonitions that attorneys *can* use to dissuade a perjury-intending client include dramatic and startling threats to report the intended perjury if it does occur and to take the stand as an impeachment witness in certain situations.[57] If the client cannot be dissuaded by admonitions to abandon intended perjury, withdrawal is appropriate. Furthermore, a passage in the majority opinion can easily be read to mean that even more drastic action on the part of defense counsel to avoid perjury is consistent with the obligation of effective assistance of counsel under the Sixth Amendment.[58] The concurring opinion by Justice Blackmun indicates general agreement with the majority on these points, but the express and

54. Both Justice Brennan and Justice Stevens wrote very short separate statements, but both concurred in the views expressed by Justice Blackmun's concurrence. The various opinions of the Court are discussed in more detail *infra* in text accompanying notes 135-181.

55. *See infra* notes 151-163 and accompanying text.

56. *See infra* note 167 and accompanying text.

57. See full discussion *infra* in text accompanying notes 151-166.

58. *See* 106 S. Ct. at 996 n.6. In this note, the Court mentions, without disapproval, the view of "most courts" which insist on a "more rigorous" approach to prospective client perjury. The cited cases specifically approve an attorney's: (1) refusal to let a perjury-intending client take the stand (United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984)); (2) reporting anticipated perjury to the trial court (McKissick v. United States, 379 F.2d 754 (5th Cir. 1967), *aff'd* after remand, 398 F.2d 342 (5th Cir. 1968)); and (3) disbarment for knowingly using false testimony (Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1969)).

implied reservations of the four members of the Court who signed the concurrence are significant.[59]

On the final procedural question of what should an attorney do if a present or past client commits perjury, the majority announced that reporting to the court is consistent with effective assistance of counsel. The firmness of the majority's announcement perhaps indicates a view that reporting should be required, although, as pointed out by the concurrence, there is no constitutional right or duty that presently would require such reporting.[60]

The majority also states that an attorney for a criminal defendant can, after withdrawal, testify to impeach the testimony given by the former client.[61] The concurring Justices, with the possible exception of Stevens, refused to state their views on this issue, because reversal in the case was warranted on the ground that Whiteside was not prejudiced by Robinson's activities.

The foregoing summary provides guidance to the important procedural questions that courts and bar associations have addressed in the past. It is to the body of law on these issues that we now turn.

II. The Historical Context of *Nix v. Whiteside*

Considering the potential for perjury in any lawsuit and the undeniable incentive for self-protective perjury on the part of a guilty defendant in a criminal action, it is surprising to find relatively few decisions that address the issues involved in *Nix*. Defendant perjury in criminal actions and the question of the attorney's proper response to it have led other legal systems to adopt dramatic changes in the usual structure of trials.[62] Thus, in most civil law countries the defendant in a criminal action is not sworn to tell the truth before testifying, and is entitled to give an un-

59. See the discussion of these points of reservation *infra* in text accompanying notes 161-166.

60. The position of Justice Brennan in his separate statement and the other Justices that subscribe to the concurrence is adamant on the point that any question of what a criminal defense lawyer should be *required* to do is a matter of state law. Furthermore, they consider it improper for the majority to express opinions on such duties. *See infra* text accompanying notes 165-166.

61. *See* 106 S. Ct. at 997 n.7 (concluding that Robinson's threat (if it was that) to testify against Whiteside meant only that Robinson would so testify if Whiteside perjured himself after Robinson withdrew as his attorney). The Court concludes, sub silentio, that the record read in this fashion discloses no Sixth Amendment question worth mentioning.

62. R. SCHLESINGER, COMPARATIVE LAW — CASES, TEXT AND MATERIALS 451-55 (4th ed. 1980).

sworn statement of his or her version of facts relevant to the case.[63]

Due to the expectation of defendant perjury, English and American courts until the late nineteenth century held, as a matter of law, that defendants were not credible witnesses in criminal cases.[64] The Canadian Bar Association has recognized the problem by requiring that criminal defense attorneys inform their clients at the start of the attorney-client relationship that admissions to the attorney may limit the type of defense that the attorney can provide to the client.[65]

In the United States there has been very little judicial treatment of the subject, but over the years, the organized bar and academic commentators have addressed the problem. As will be seen, these approaches have generally been inconsistent and have disagreed on the proper role and function of a criminal defense attorney.

A. Lawyers and Subornation of Perjury

Perjury, the giving of known false testimony or evidence in a judicial proceeding under oath, has been a statutory crime in England since at least 1563.[66] At the time of Blackstone the crime was punishable by fine or imprisonment with an automatic prohibition against giving testimony in any future proceeding.[67] In this country, the crime of perjury is a felony under federal law and under the statutes of almost all states.[68] The closely allied crime of subornation of perjury, is also usually designated as a felony under state statutes.[69]

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63. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience,* 26 BUFFALO L. REV. 361, 367 (1977); *see also* United States v. Grunewald, 233 F.2d 556, 578, 587-92 (Frank, J., dissenting in part); *id.* at 587-92 (Appendix II) (2d Cir. 1956), *rev'd* 353 U.S. 391 (1957).

64. *See* Nix v. Whiteside, 106 S. Ct. at 993. This historical legacy at least partially explains why the question of whether defendants in criminal actions have a constitutionally protected right to testify still remains open. *Id.* at 993-94.

65. Lefstein, *supra* note 10, at 688 n.96.

66. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts,* 24 THE AM. J. OF LEGAL HIST. 145, 145-46 (1980).

67. R. PERKINS, CRIMINAL LAW 510-13 (3d ed. 1982) (citing BLACKSTONE, 4 BLACKSTONE'S COMMENTARIES 137-38).

68. 18 U.S.C. § 1621 (1985) (perjury punishable by fine up to $2000 and imprisonment of five years; e.g., CAL. PEN. CODE § 126 (Deering 1983); *see also* PERKINS, *supra* note 67, at 513.

69. While most states prohibit subornation of perjury under a specific statute, others merely authorize prosecution of the crime under the general statute prohibiting solicitation to commit a crime. An example of the specific statute approach, California Penal Code § 127 provides: "Every person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured." New York, on the other hand, has prosecuted subornation of perjury under Penal Code § 100.05, which generally prohibits criminal solicitation. People v. Luft, 259 App. Div. 222, 18 N.Y.S.2d 880 (1940).

There are very few reported decisions holding attorneys guilty of the charge of subornation of perjury.[70] The subornation issue relevant to *Nix* concerns the criminal liability of an attorney who does not actively procure perjured testimony, but who merely questions a witness knowing that the testimony he or she is asking for will be perjurious.[71] Commentators and courts apparently agree that the attorney who asks questions of a witness knowing that perjury will result could be successfully prosecuted for subornation of perjury.[72] However, even though the United States Supreme Court agrees with the possibilty of applying a subornation statute to a "passive" attorney, no cases in which such an attorney has actually been so prosecuted can be found.[73]

State standards of professional conduct specifically forbid attorneys to use or offer testimony or evidence to a court that is known by the attorney to be false.[74] The standards are enforced by sanctions such as suspension or disbarment from practice, and the sanctions are imposed either through court actions or by administrative tribunals with court review available to the disciplined attorney. As might be expected, there are many reported cases involving substantial sanctions against lawyers who took an active role in either the production of false evidence or the procurement of false testimony.[75] However, as with the pattern of perjury prosecutions, there are very few reported decisions in which disciplinary sanctions have been levied against an attorney who did nothing more than conduct an examination that elicited perjury, and did not report the perjury to the court. Invariably, reported disciplinary actions

70. Wolfram, *supra* note 14, at 818-19 (1977); Porter, *Lying Clients and Legal Ethics: The Attorney's Unsolved Dilemma*, 16 CREIGHTON L. REV. 487, 487 n.3 (1983).

71. People v. Jones, 254 Cal. App. 2d 200, 217-18, 62 Cal. Rptr. 304, 315-16 (1967).

72. *In re* Branch, 70 Cal. 2d 200, 210-11, 449 P.2d 174, 181, 74 Cal. Rptr. 238, 245 (1969) ("An attorney who attempts to benefit his client through the use of perjured testimony may be subject to criminal prosecution . . . ."); People v. Davis, 48 Cal.2d 241, 257, 309 P.2d 1, 10 (1957) ("Counsel may not offer the testimony of a witness which he knows to be untrue. To do so may consitute subornation of perjury."). *See* Wolfram, *supra* note 14, at 816-17.

73. The United States Supreme Court clearly indicates its view of the possibility in Imbler v. Pachtman, 424 U.S. 409, 429 (1976) and in *Nix*, 106 S. Ct. at 996. In researching the matter, Professor Porter found no reported prosecutions of "passive" attorneys, who with knowledge asked the perjury eliciting questions. Porter, *supra* note 70, at 487 n.3.

74. The history of the American Bar Association standards of professional conduct, which have been adopted in almost every state for the purpose of controlling the legal profession, is discussed *infra* in text accompanying notes 78-112.

75. Three frequently cited decisions of this type are Dodd v. The Florida Bar, 118 So. 2d 17, 19 (Fla. 1960) ("No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowlegeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty."); Iowa Bar v. Crary, 245 N.W.2d 298 (Iowa 1976); and *In re* Carroll, 244 S.W.2d 474 (Ky. 1951).

involving perjury concern attorneys who took an active role in inducing the perjury.[76]

There are at least three possible reasons for the scarcity of reported prosecutions or disciplinary actions involving passive attorney conduct in the form of merely asking questions that elicited perjurious testimony. First, often the most important testimony in such a proceeding must come from an admitted perjurer, which is hardly the type of evidence a prosecutor or state bar attorney wants to use as the basis for prosecuting a case. Second, there has been considerable concern in recent years over the constitutionality of an attorney's refusal to "put on the client and let him tell his (or her) story", a concern that has to some degree been laid to rest by the *Nix* decision. Finally, unless the accused attorney's client in the action in which the perjury occurred cooperates with the prosecuting authorities, the attorney-client privilege can pose great problems in gathering and presenting the necessary evidence to prove that subornation of perjury—or the perjury itself—has occurred.[77]

B. Standards of Professional Conduct

The legal profession's conception of the proper role of the litigating attorney has changed over the years, as can be seen by reviewing the standards of conduct adopted by the national organization of the profession. The officer of the court role was accepted until the mid-1970s, at which time the prevailing view shifted to an alter ego advocate role con-

76. Divorce litigation has generated a disproportionate share of such disciplinary actions, and the client perjury involved usually relates to rather technical matters such as residency. In such matters it is highly likely that the attorney took a more active role than merely asking the questions that elicited the perjury. *See, e.g.,* Florida Bar v. Agar, 394 So. 2d 405 (Fla. 1980); and *In re* Grimes, 326 N.W.2d 380 (Mich. 1982). The California decision of *In re* Jones, 208 Cal. 240, 280 P. 964 (1929) is often cited by courts in and outside of California for the proposition that passive attorney conduct in regards to client perjury can subject the attorney to sanctions. However, the allegations and facts in the case involved active procurement of perjurious testimony by the attorney involved as well as merely passive conduct, and the appellate court's findings of fact are somewhat ambiguous. 208 Cal. at 243, 280 P. at 965. *In re* Palmer, 252 S.E.2d 784 (N.C. 1979), appears to be one of the few clear passive attorney conduct cases in which discipline was imposed. The attorney failed to withdraw when it was clear that the client intended to commit perjury on the stand. On the other hand, in *In re* Malloy, 248 N.W.2d 43 (N.D. 1976), the court dismissed a disciplinary complaint against an attorney who did no more than fail to withdraw from representation upon the surprise perjury of a client in a deposition.

77. *See, e.g.,* proposed FED. R. EVID. 503, which is considered an accurate statement of the attorney-client privilege. Proposed Rule 503 provides, in pertinent part:

> . . . A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . [but t]here is no privilege under this rule . . . [i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit . . . a crime or fraud . . . .

cept. The most recent professional standards appear to have been drafted with a compromise role for the lawyer in mind.

1. The ABA Canons of Professional Ethics

In 1908 the American Bar Association promulgated its Canons of Professional Ethics. For sixty-two years the Canons, as the standards soon came to be known, formed the basis for lawyer discipline throughout the United States.[78] Prior to 1908, a number of academics and practicing attorneys had expressed personal views on lawyer ethics in books and articles, but the ABA Canons represented the first successful effort by a national professional association of attorneys to set out a consensus view on matters of professional responsibility.[79] The predecessors to the Canons generally were in accord with traditional views of legal professionalism, prohibiting such gambits as counsel's expression of belief in the client's case.[80] However, the nineteenth century codes were silent on the procedural questions involved in *Nix*. Thus, it is somewhat surprising to find that the Canons were rather direct in furnishing guidance on three of the four procedural questions involved in the *Whiteside v. Scurr* and *Nix* decisions.

Canon Five specifically concerned the duties of a defense attorney in a criminal case, but it offered little more than the statement that an attorney "is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."[81] With the law of the Due Process Clause as undeveloped as it was at the time, the meaning of the phrase was not readily apparent, and it was too general to provide much guidance to an attorney in Robinson's position.

The Canons governing the actions of attorneys in the general field of litigation were more specific, but gave little meaningful direction on the four procedural questions in *Nix*. Those Canons urged that candor should characterize the conduct of all lawyers toward courts, and that the lawyer, not the client, is ultimately responsible for questionable suits and defenses.[82] Canon Twenty-Four stated the principle that no client

78. D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 180 (1973).

79. *See, e.g.*, MELLINKOFF, *supra* note 78, at 171-74 (discussing D. HOFFMAN, *Resolutions in Regard to Professional Deportment*, in A COURSE OF LEGAL STUDY 744 (2d ed. 1836)); G. SHARSWOOD, A COMPENDIUM OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW (1854); G. WARVELLE, ESSAYS IN LEGAL ETHICS (1902).

80. *See, e.g.*, MELLINKOFF, *supra* note 78, at 257-59 (discussing the false expression of belief in a client's case).

81. ABA CANONS OF PROFESSIONAL ETHICS, Canon 5 (1908).

82. ABA CANONS OF PROFESSIONAL ETHICS, Canon 22 (commands candor) and Canon 31 (fixes responsibility for questionable claims and defenses).

has a right to demand that an attorney do anything "repugnant to his own sense of honor and propriety." Canon Sixteen expanded on that principle and directed an attorney to use "his best efforts" to restrain and prevent a client from doing anything unethical, particularly in regards to court proceedings. If the client maintained an unethical intention, the attorney was required to "terminate their relation."[83] Withdrawal in such circumstances was also authorized in the Canon that otherwise limited the circumstances in which an attorney could voluntarily withdraw from employment by a client.[84]

The general Canons that established ethical obligations for attorneys in any form of practice, including office consultation, gave the most direct guidance on the procedural questions addressed in *Nix*. First, Canon Fifteen prohibited attorneys from violating any law in the course of employment by the client, a prohibition which apparently included statutes making subornation of perjury a crime.[85] When perjury occurred, counsel was directed to "bring the matter to the knowledge of the prosecuting authorities."[86] This special duty was also indicated by the general duty to notify an injured party and his or her counsel, if necessary to rectify any "fraud or deception . . . unjustly imposed upon the court. . . ."[87] The attorney's duty of confidentiality as set out in the Canons presented little difficulty to an attorney with an obligation to report a client's perjury, because Canon Thirty-seven specifically excluded the announced intention to commit a crime from those client confidences an attorney was bound to respect.[88]

Finally, the Canons provided rather clear direction on the type of admonitions that could properly be used by an attorney to dissuade a client from perjury. In Canon Thirty-Two, an attorney was urged to give "advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law."[89] The type of strong warning given by Robinson to Whiteside would have been gener-

83. ABA CANONS OF PROFESSIONAL ETHICS, Canon 16.

84. ABA CANONS OF PROFESSIONAL ETHICS, Canon 44 establishes that an attorney may not terminate an employment relationship except for "good cause." The Canon generally defines the term to cover situations in which the client insists upon "an unjust or immoral course in the conduct of his case."

85. *See supra* text accompanying notes 69-76.

86. ABA CANONS OF PROFESSIONAL ETHICS, Canon 29.

87. ABA CANONS OF PROFESSIONAL ETHICS, Canon 41. While this Canon speaks of informing the opposing party and Canon 29 specifies that the authorities be notified in the event that an attorney discovers perjury, the practical difference appears to be nil. The opposing party would notify authorities of perjury causing that party harm so that official steps to undo the effects of the perjury would be undertaken.

88. ABA CANONS OF PROFESSIONAL ETHICS, Canon 37.

89. ABA CANONS OF PROFESSIONAL ETHICS, Canon 32.

ally authorized under this provision. Robinson's statement that he would tell the judge about Whiteside's perjury would also have been required under the Canon which established the duty of an attorney to inform the authorities about perjury that has been committed. Finally, Robinson would also have been free to testify against Whiteside without violating the attorney's obligation of confidentiality, because the announced intention to commit the crime of perjury was outside the scope of that obligation.[90]

The Canons were clearly framed with the general idea in mind that the officer of the court role was the proper model for the behavior of all attorneys. The obligation to prevent successful perjury from occurring was explicit, and the client's interests were unambiguously subject to sacrifice in order to accomplish the goals of preventing fraud upon the court and detecting perjured testimony.

2. *The Model Code of Professional Responsibility*

In 1969, the ABA promulgated a second set of standards of professional behavior for state adoption. The 1969 standards were titled the Model Code of Professional Responsibility and are usually referred to as the Code. The Code was adopted in all states except California, and the legal profession in a large majority of states is still governed by the Code.[91]

The Code is divided into nine basic sections, which are referred to as canons. Each canon begins with a Canon, an extremely general statement of an attorney's duty in regard to a particular subject.[92] Each section or canon contains a number of Disciplinary Rules, or DR's, which

90. Note that the announced intention to commit a crime is also excluded from the protection of the attorney-client privilege under proposed FED. R. EVID. 503(d)(1). There is a slight point of interpretation to be addressed in that the exception applies by its terms in situations in which the "services of the lawyer were sought or obtained to enable or aid anyone to commit a . . . crime." It might be argued, although not persuasively, that the services of an attorney in Robinson's position were obtained to assist Whiteside in defending against a murder charge, and making such a defense is not a crime. However, the exception must be read to be broad enough to cover situations in which the general object of the employment is legal, but certain steps or aspects of the employment involve the commission of a crime, such as perjury.

91. At this writing, only eleven states have replaced the Code with the Model Rules of Professional Conduct, discussed *infra* in text accompanying notes 111-112. In California, the Code heavily influenced that state's disciplinary standards. *See* California Rules of Professional Conduct. The California State Supreme Court adopts the state's Rules of Professional Conduct which are usually recommended to that court by the California State Bar Association. The other collection of standards governing the conduct of California lawyers is the State Bar Act, CAL. BUS. & PROF. CODE §§ 6000-6172 (West 1983).

92. *See, e.g.*, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1: A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession (1981).

constitute mandatory rules of behavior that must be followed by attorneys to avoid discipline. The DR's provide general guidance on those points of professional ethics on which consensus has been reached, such as: an attorney should never knowingly use perjured testimony (or any false evidence) and an attorney should withdraw if continued employment will result in a violation of any of the DR's, including the DR forbidding the use of perjured testimony.[93] The DR's in each canon are preceded by a number of statements known as Ethical Considerations, which are designed to assist state disciplinary bodies in interpreting the DR's that follow. The Ethical Considerations contain general statements of ABA policy and illustrative examples of applications of the relevant DR's.

Perhaps the most significant difference between the Canons and the 1969 Code is that the duty to preserve client confidences in the Code is broader than the confidentiality obligation contained in the Canons.[94] As originally adopted in 1969, the Code required an attorney to report any fraud perpetrated by his or her client "upon a person or tribunal" in the course of the representation.[95] While this requirement is not quite as broad as the duty contained in the Canons, the 1969 version of DR 7-102(B)(1) clearly commanded attorneys to report client perjury without regard for the attorney's duty of confidentiality set forth in DR 4-101.[96]

In 1974, the ABA amended DR 7-102(B)(1) by eliminating the duty to report "when the information [which the attorney must reveal to the

93. DR 7-102(A)(4) prohibits the use of perjured testimony and DR 2-110(B)(2) requires withdrawal from employment if the violation of a DR is going to be required by a client.

94. As was the case under Canon 37 (*see supra* text accompanying note 88), DR 4-101(A) and (B) require an attorney to hold all information in confidence that would be protected by the attorney-client privilege from being revealed in court. However, 4-101(A) and (B) also require an attorney to hold in confidence any other information gained in the professional relationship if the disclosure of it would be embarrassing or detrimental to the client. Thus, the general duty of confidentiality in the Code applies to the announced intent to commit a crime (including that of perjury), while the duty of confidentiality would not apply to such information under Canon 37. *See supra* text accompanying note 88.

95. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1). As the DR read upon adoption in 1970, the text stopped with the second use of the word "tribunal". The privileged communication exception provision was added in 1974. *See infra* text accompanying note 97.

96. Canon 41 established the duty of an attorney to report all frauds and deceptions imposed "upon the court or a party" including those frauds and deceptions perpetrated by his or her client at any time. DR 7-102(B)(1) applies only to frauds perpetrated "during the course of [the attorney's] representation [of the client]." *See* discussion of Canon 41, *supra* note 87. Thus Canon 41 had a broader scope than DR 7-102(B)(1). The duty to report frauds under the 1969 version of DR 7-102(B)(1) did not conflict with the duty of confidentiality established in DR 4-101. The latter DR provides a general exception to the duty of confidentiality when an attorney is permitted to disclose information under another Disciplinary Rule. Since DR 7-102(B)(1) required disclosure of fraud, *a fortiori* the RULE "permitted" such disclosure.

defrauded person or tribunal] is protected as a privileged communication."[97] Since the attorney-client evidentiary privilege does not apply in situations where the client seeks the services of an attorney to aid in the commission of a crime, the 1974 amendment on its face would not have effectively eliminated an attorney's duty to inform a court of perjury.[98] However, the ABA issued a Formal Opinion in 1975 stating that the word "privileged" in the 1974 proviso to DR 7-102(B)(1) included not only the evidentiary concept of the attorney-client privilege, but also encompassed all information shielded under the attorney's duty of confidentiality in DR 4-101.[99]

For all practical purposes, the 1975 Formal Opinion completely eliminated any reporting obligation of attorneys due to the extent of the duty of confidentiality. Thus, the Code with the 1974 version of DR 7-102(B)(1), prohibits attorneys from reporting client perjury, and the alter ego advocate role concept is thereby adopted in the Code.[100]

3. *Proposed Criminal Justice Standard 4-7.7*

In 1971, the American Bar Association approved a draft of a detailed procedure for criminal defense attorneys to follow when confronted with a perjury-intending client. Eight years after the ABA formally approved an elaborate set of Standards Relating to the Administration of Criminal Justice, however, the House of Delegates was not asked to approve Proposed Standard 4-7.7, which closely followed the 1971 draft procedure.[101]

As will be discussed below, the approach to the problem of client perjury contained in 4-7.7 differs from that in the 1983 Model Rules.[102] However the terms of 4-7.7 and its similar predecessor provided the basis for judicial consideration of client perjury for the last fifteen years. Standard 4-7.7 represents an energetic attempt to supply a cohesive procedure sorely needed by the profession, given the fragmentary and

97. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1).

98. *See* proposed FED. R. EVID., *supra* note 77, 503(d)(1).

99. ABA Comm. on Ethics and Professional Responsibility Formal Op. 341 (1975).

100. Oddly enough, when perjury, or "fraud on the tribunal" has been committed by someone other than the attorney's client, there is an absolute duty to report it to the court under DR 7-102(B)(2). Nothing in this DR provides an exception from the duty to inform in order to protect client confidences. Perhaps this is just an oversight on the part of the ABA drafters, who left the original language of the 1969 version of DR 7-102(B)(2) intact, while drastically changing the language in DR 7-102(B)(1) in 1974. *See supra* text accompanying notes 97-99.

101. See ABA Standards Relating to the Admin. of Criminal Justice, footnote to Standard 4-7.7. Proposed Standard 4-7.7 is discussed in *Nix*, 106 S. Ct. at 996 n.6.

102. See *infra* text accompanying notes 111-112.

contradictory provisions in the 1974 Code.[103] The standard is animated by a conception of the role of the criminal defense attorney very close to that which appears to lie behind the 1974 Code—the criminal defense lawyer should assume an alter ego advocate role.

Standard 4-7.7 is explicit on the first attorney-client relationship procedural question—when does an attorney have a duty to act. An attorney is instructed to take action to prevent client perjury when (1) the client has admitted facts establishing guilt to the attorney, and (2) the attorney's independent investigation establishes that the client's admissions are true.[104] As to the second question, concerning the admonitions an attorney can make to his or her client to dissuade the client from intended perjury, the Standard is vague. It states only that counsel should "strongly discourage" the client from taking the stand and committing perjury.[105]

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103. Proposed Standard 4-7.7 of the Standards Relating to the Admin. of Criminal Justice provides in full:

> (a) If the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true but the defendant insists on the right to trial, counsel must strongly discourage the defendant against taking the witness stand to testify perjuriously.
>
> (b) If, in advance of trial, the defendant insists that he or she will take the stand to testify perjuriously, the lawyer may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of the lawyer's reason for seeking to do so.
>
> (c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjuriously in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

T. MORGAN AND R. ROTUNDA, 1985 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 252-53 (1985) (hereinafter cited as Proposed Standard 4-7.7).

104. Proposed Standard 4-7.7(a), *supra* note 103. It is mysterious why the *guilt* of the client must be established by the admissions. The relevant concern would seem to be whether the client's admissions have established that the client now intends to commit perjury as to any relevant fact. Note that under the Standard's position on when an attorney's duty to take action to prevent perjury arises, Robinson would have had no duty to attempt to dissuade Whiteside not to commit perjury, as Whiteside had not admitted facts showing that he was guilty of first degree murder to his counsel. *Nix*, 106 S. Ct. at 991-92.

105. Proposed Standard 4-7.7(a), *supra* note 103.

If the attempted dissuasion is unsuccessful, the third procedural question is raised. On this point, 4-7.7 is elaborate. The attorney should request leave to withdraw from the case, without giving the reason for the request.[106] From the reported cases it would appear that the conventional "reason" given to the court in such situations is that there are "irreconcilable differences" between the attorney and the client.[107] In the common situation in which the public treasury is paying for the representation of the accused, the client's failure to pay attorneys fees is eliminated as a reason for "irreconcilable differences." It is therefore likely that a judge given this reason for withdrawal by a publicly financed defense counsel will immediately suspect a disagreement between client and counsel concerning intended false testimony or other false evidence.

If leave for withdrawal is granted, 4-7.7 has nothing more to say concerning the attorney's conduct. It should be noted that once the attorney withdraws, it is very likely that the next counsel to represent the defendant will not be told the facts that convinced the withdrawing attorney that the testimony the client intends to give is perjurious. Thus, under the 4-7.7 procedures, granting withdrawal motions probably would increase the amount of perjury elicited in court by unknowing attorneys.

If the trial court denies the request to withdraw, the Standard offers a detailed procedure to be followed.[108] The general guideline furnished by the Standard is that it is "unprofessional conduct" for an attorney to "lend aid to the perjury" or use the perjurious testimony in any way. Specifically, defense counsel is instructed to initially make a record, out of the presence of the judge and jury, of the fact that his or her client is testifying against the advice of counsel. After conducting a normal examination of the defendant on all subjects on which no perjury is anticipated, the attorney should ask the client if he or she has any additional statement to make. The perjured testimony may not be argued to the jury or relied upon in counsel's closing argument. This procedure obviously has at least one significant fault. The judge, and perhaps some sophisticated jurors, will sense the import of counsel's seeming "abandonment" of the defendant in the midst of his or her testimony.[109]

106. Proposed Standard 4-7.7(b), *supra* note 103.

107. *See* People v. Schultheis, 638 P.2d 8, 15 (Colo. 1981); State v. Lee, 142 Ariz. 210, 220, 689 P.2d 153, 163 (1984).

108. The remainder of this paragraph describes the procedure outlined in Standard 4-7.7(c). *See* Proposed Standard 4-7.7, *supra* note 103.

109. Another possible flaw in the recommended procedure is that asking the client for "any additional statement" may be objectionable because it calls for testimony in narrative form. *See Lawyer's Trilemma*, *supra* note 8, at 29. Note, however, that narrative testimony may be

On the fourth procedural question, concerning an attorney's obligation after perjury has been committed by the client (or former client if the request for leave to withdraw has been granted), the language of the Standard is silent. However, the implication is obvious. It would make little sense for the attorney to follow the awkward procedures prescribed, only to subsequently inform the court of the fact that the client (or former client) has committed perjury.[110] The Standard appears to be quite consistent with the 1974 version of DR 7-102(B)(1) on this point.

Although the difficulties and awkwardness with the 4-7.7 procedures are clear, there is no solution to the question of attorney response to intended client perjury that will not, to some degree, sacrifice interests that are worthy of consideration. The main point regarding 4-7.7 is that it constitutes a clear and rather uncompromised attempt to give guidance to the practicing bar for responding to an extremely difficult situation. The contrast with the 1974 Code provisions on this point is striking. There is also a marked contrast between the 1974 Code provisions on the client perjury problem and those contained in the Model Rules of Professional Conduct, adopted by the ABA House of Delegates in 1983.

4. The Model Rules of Professional Conduct

While the Code contained contradictory provisions, and, after 1974, effectively prohibited an attorney from reporting client perjury, the Model Rules of 1983 explicitly required "reasonable remedial measures" when a client has committed perjury, regardless of the duty of confidentiality.[111] The duty of confidentiality is expressed in extremely broad terms in Model Rule 1.6, but the language of Rule 3.3 and the comments to the Rule containing the duty of confidentiality make it clear that an attorney must take measures to remedy the client perjury regardless of the confidentiality obligation.[112] Thus, the drafters of the Model Rules removed the major restriction, imposed in the 1974 Code, on an attorney's obligation to the court to prevent fraud in proceedings.

However, as the comments to Model Rule 3.3 make clear, the requirement that an attorney take reasonable remedial measures is not an automatic requirement to report client perjury to the court. In paragraph eleven of the comments, the drafters state that an attorney discov-

admitted at the discretion of the trial court. FED. R. EVID. 611; J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 611[01], at 611-17 (1985).

110. Wolfram, *supra* note 14, at 866 n. 225.

111. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4).

112. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) and 3.3(b), comments to Rule 3.3 entitled "False Evidence" and "Perjury by a Criminal Defendant," and comment to Rule 1.6 entitled "Disclosures Otherwise Required or Authorized."

ering client perjury should first remonstrate with the client to remedy the situation. If that is unavailing, the attorney should seek to withdraw from the case, and, if withdrawal is either denied or "will not remedy the situation," the attorney should report the perjury to the court.

It is hard to imagine situations in which counsel's withdrawal, of itself, will remedy the harm caused by perjured testimony. Thus, it would appear that reporting will be required under Rule 3.3 in almost all cases of client perjury. However, paragraph twelve of the comments to Rule 3.3 specifically exempts an attorney from the obligation to report client perjury in criminal prosecutions, if the controlling case law in the court in which the perjury occurs precludes the attorney from reporting in order to protect the client's constitutional rights.

Although somewhat restrained by the language of the comments to Rule 3.3, the Model Rules clearly opt toward the officer of the court role for the trial advocate in the criminal prosecution setting. The *Nix* decision has endorsed this concept of the lawyer's role and removed some of the uncertainty concerning the constitutionality of the Model Rules governing criminal defense counsel.

C. Constitutional Decisions Prior to *Nix v. Whiteside*

The concern over constitutional constraints expressed in the comment to Model Rule 3.3 was well taken. By 1983, a number of federal circuit courts had shown concern and confusion over the constitutional implications of a criminal defense attorney's response to client perjury. While the Supreme Court had never specifically decided whether a defendant enjoys a right to testify in his or her own behalf under the Due Process Clause, many circuit courts had held that such a constitutional right did exist.[113] This right, and the sixth amendment right to effective assistance of counsel in defending against a criminal prosecution, could clearly be affected by the response of a defense counsel confronted by client perjury or a client's intention to commit perjury.[114]

113. United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984); United States v. Bifield, 702 F.2d 342, 349 (2d Cir. 1983).

114. Some of the most interesting speculation on the subject of the consitutional implications of an attorney's response to client perjury or the threat thereof can be found in Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601 (1979). The author discussed the possible implications of the Fifth Amendment privilege against self-incrimination on the duty of defense counsel to report perjury. This view appears to be groundless after *Nix*, which omits any consideration of the privilege in discussing the duty of counsel to report a client perjury. *See infra* text accompanying notes 150-153.

Since 1963, it has been clear that anyone prosecuted for a crime carrying a penalty of possible imprisonment has the right to effective assistance of counsel in defending against the charge, at state expense if necessary.[115] Just what attributes of an attorney are guaranteed under the effective assistance of counsel rubric has remained generally unspecified, although the Court has held that effective assistance of counsel does not require that the defense attorney and his or her client enjoy a "meaningful relationship" marked by trust and confidence.[116]

In the 1984 decision of *Strickland v. Washington*,[117] the Court for the first time addressed the general concept of attorney error and the Sixth Amendment rights of the defendant in a criminal action. The Court established that the level of attorney performance guaranteed a criminal defendant under the Sixth Amendment was the conduct of a defense in a manner that was reasonably effective and not "outside the wide range of professionally competent assistance."[118] This required a defense without errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[119] The Court mentioned "prevailing norms of practice" such as ABA standards as nonbinding guides to determining "reasonable effectiveness" in specific cases.[120]

Prior to *Nix*, the United States Supreme Court had not considered specific actions or procedures that a defendant might have a constitutionally protected right to expect from a defense attorney. However, the Court had taken a definite stand against perjury. In *United States v. Grayson*,[121] the Court held that a judge violated no constitutional right of the defendant by enhancing the sentence given after conviction because the judge believed that the defendant had committed perjury during his testimony. The Court's attitude toward perjury was in keeping with its rejection of the "sporting theory" expressed by Justice Douglas in *Brady v. Maryland*.[122] Not surprisingly, the Court has also held that a convic-

115. Gideon v. Wainwright, 372 U.S. 335 (1963). The right to counsel applies only in those prosecutions in which loss of liberty is a possibility. Argersinger v. Hamlin, 407 U.S. 25 (1972).

116. Morris v. Slappy, 461 U.S. 1, 13-14 (1983).

117. 466 U.S. 668 (1984).

118. *Id.* at 690.

119. *Id.* at 687.

120. *Id.* at 688.

121. 438 U.S. 41, 54 (1978).

122. 373 U.S. 83, 90-91 (1963). In *Brady*, the Court required the prosecution to turn over all exculpatory evidence to the defendant in order to ensure a fair trial. *Id.* at 84-86. This requirement of prosecutors emanates from the Due Process Clause. Following *Brady*, DR 7-103(B) made this duty the subject of bar discipline. In the latest professional standards, Model Rule 3.8(d) also imposes this duty on the prosecutor as a professional obligation.

tion obtained in a trial in which perjured testimony was given by a prosecution witness violated the due process rights of the defendant, regardless of the effect of the perjury on the trial result.[123]

Over the last ten years, five federal circuit courts have examined the constitutional issues presented when court-appointed counsel react to what they see as intended or accomplished perjury of their clients, or of witnesses friendly to their clients. The results have been mixed: three circuits held the attorneys' reactions violated the constitutional rights of the client, and two circuits found the actions of the attorneys involved to be constitutionally permissible.

The doctrinal views adopted by these courts have also been mixed, although certain common elements of analysis can be found. The Supreme Court's announcement that there is no constitutional right to commit perjury was invoked in almost every decision. Another constant was the acceptance of the constitutionality of defense counsel admonishing the perjury-intending client to renounce the intention to perjure and of defense counsel requesting withdrawal if the admonition failed. Beyond these points of agreement the cases were in disarray, and the *Nix* decision does not remove all of the points of conflict and confusion. Most of the decisions discuss Standard 4-7.7, several of the decisions accept the idea that a right to testify in one's own behalf is implicit in the right to due process, and almost all of the decisions consider the constitutional implications of the attorney's actions in the terms of the Sixth Amendment right to effective assistance of counsel.

Where the actions of defense counsel effectively revealed to the fact finder in the proceeding that counsel believed perjury was intended *prior* to its commission, courts have held that the defendant's due process and sixth amendment rights were violated. Thus, in *Lowery v. Cardwell*[124], the Ninth Circuit held that counsel, in stopping direct examination of her client and immediately asking the court for permission to withdraw from the case, violated the defendant's right to a fair trial because the court, sitting without a jury, was the finder of fact.[125] The abrupt way in which counsel reacted to what was apparently unanticipated perjury indicated to the judge, a sophisticated fact finder, that counsel believed the testimony was false. However, the court generally approved the 4-7.7 procedure in cases that were being tried before a jury.[126]

123. Napue v. Illinois, 360 U.S. 264, 269 (1959).

124. 575 F.2d 727 (9th Cir. 1978).

125. *Id.* at 731.

126. In *Lowery*, the 4-7.7 procedure was followed as much as possible: counsel sought withdrawal and refused to give a reason. Upon denial of the request to withdraw, the attorney did not continue to question the witness-defendant and did not argue from the defendant's

In *United States ex rel. Wilcox v. Johnson*,[127] the Third Circuit reversed a conviction on the basis that the defense attorney did not provide effective assistance of counsel. At the attorney's request, the trial court ruled that if the defendant insisted on testifying, the defense counsel would be permitted to withdraw and the defendant would have to represent himself in the proceeding. Contrary to the procedure of Standard 4-7.7, defense counsel informed the judge of her belief that the defendant intended to perjure himself on the stand and therefore requested permission to withdraw. More importantly, the circuit court found that the attorney did not have an adequate basis for forming the belief that the client intended to commit perjury.[128] The court in dicta indicated that if counsel had a firm factual basis for believing that her client intended perjury, the proper course was for her to seek withdrawal without discussing the reason, and the judge should respond by appointing a replacement counsel for the defendant.[129]

When these decisions are considered with *Whiteside v. Scurr*, a general conception of the proper role of a defense attorney arises. The Eighth Circuit's decision was predicated on the idea that a criminal defense lawyer must at least passively cooperate if the client insists on committing perjury, while *Lowery* is apparently premised on the idea that if a criminal prosecution is tried before a court without a jury, defense counsel should cooperate in the perjury by putting the client on and conducting the examination and later argument so that the judge is not made aware of counsel's doubts about his or her client's credibility. The role concept adopted by these courts is obviously that of the alter ego advocate, whose duties toward the court are extremely limited.

The facts in *Wilcox* are rather extreme on the point of attorney misconduct: counsel actually told the judge of her doubts as to client credibility prior to the testimony, taking this action on the basis of what

testimony in her closing argument. *Id.* at 729. These actions are all recommended under 4-7.7, although the Standard is directed to situations in which the defendant announces the intent to commit perjury to his or her attorney prior to taking the stand, whereas this case presents what appears to be unanticipated perjury. *See* Proposed Standard 4-7.7, *supra* note 103.

127. 555 F.2d 115, 122 (3d Cir. 1977).

128. In *Wilcox*, counsel was unable to recall the basis for her conviction that appellee would perjure himself, and the court noted that there was no record evidence indicating that the defendant intended to commit perjury. *Id.* at 121-22.

129. This procedure suffers from the same aura of unreality as Standard 4-7.7, because the judge will often immediately surmise the reason for a court-appointed counsel's request to withdraw. *Wilcox*, 555 F.2d at 122. *See supra* text accompanying notes 107-108. Also, the next court-appointed counsel will probably end up unknowingly putting on the perjured testimony in the normal manner if the defendant learns to hide the true story after having gone through the conferences leading up to the withdrawal request by the first attorney.

apparently was no more than a general knowledge of the client from past representation. Thus, it may be unproductive to speculate on the conception of the proper role for defense counsel held by the reviewing court. However, the court indicated a "proper" procedure under which the perjury-intending defendant will obtain a new attorney. As a practical matter this will give a defendant the opportunity in many cases to have his or her perjured testimony placed before the trier of fact with the full participation of the innocent replacement counsel.

The Seventh Circuit in *United States v. Curtis*[130] adopted an officer of the court role concept, and the decision strongly contrasts with *Wilcox*. In *Curtis*, defense counsel, on the basis of substantial investigation and contradictory statements by the client, formed the opinion that his client intended to commit perjury. Counsel thereafter refused to put the defendant on the stand. The reviewing court recognized a constitutional right of the defendant to testify in his own behalf, but qualified that right to apply only to truthful testimony. Thus, although counsel refused to permit the defendant to take the stand, the court held no constitutional rights of the latter were infringed.

While the *Curtis* court specifically noted the verbatim language of Standard 4-7.7, it declined to comment on whether those actions of counsel that conflicted with the Standard should subject him to professional discipline.[131] However, it logically follows from the court's holding that no professional discipline should be invoked. First, perjury would have occurred had the defendant not been kept off the stand. Second, the defendant's constitutional rights were unaffected by the refusal of his counsel to permit the testimony. Lastly, the Code instructs attorneys never to knowingly use false evidence of any kind, the purpose being to protect court processes from fraud and debasement.[132]

The *Curtis* approach to client perjury is of a piece with that shown in the Fifth Circuit decision in *McKissick v. United States*.[133] In *McKissick*, counsel reported to the court that his client had admitted committing perjury during the previous day's testimony, and a mistrial was declared. Holding that the mistrial order was correct and no double jeopardy attached to the first trial, the court found no violation of the defendant's constitutional rights and praised the defense attorney for protecting the integrity of the court by reporting the perjury

130. 742 F.2d 1070 (7th Cir. 1984).

131. *Id.* at 1076 n.4.

132. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4).

133. 398 F.2d 342 (5th Cir. 1968). The case was previously reviewed and remanded in McKissick v. United States, 379 F.2d 754 (5th Cir. 1967).

immediately.[134]

Thus, the circuit court decisions prior to *Nix* split sharply on the conception of a criminal defense attorney's proper role in the client perjury context. Although *Lowery*, *Wilcox* and *Whiteside v. Scurr* are influenced in varying degrees by the alter ego advocate concept, *Curtis* and *McKissick* are only consistent with the officer of the court model.

III. The Supreme Court Decision in *Nix v. Whiteside*

A. Opinions of the Court

The majority opinion in *Nix v. Whiteside* takes an unequivocal position on the proper role of the criminal defense attorney.[135] Counsel in such situations is at all times "an officer of the court."[136] As such, he or she is "a key component of a system of justice, dedicated to a search for truth."[137] The duty of an attorney to advocate a client's cause "is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth".[138] An attorney may not knowingly be a party to perjury, or in any way give aid to the presentation of such testimony.[139] Thus the language of the majority, in no uncertain terms, embraces the officer of the court role.

More important than the Court's rhetoric is the unqualified announcement of a criminal defense attorney's duty to report known perjury committed by a client.[140] This "direction" on proper procedure for attorneys to follow reinforces and gives meaning to the Court's decision that the proper role of a criminal defense counsel is distinctly different from that of an alter ego advocate.

The majority opinion makes three determinations of constitutional doctrine, all of which are generally accepted by the concurring opinion of Justice Blackmun. The first determination is that the "prejudice" requirement in *Strickland* cannot be met on the basis of the presumption

134. 398 F.2d at 343. In the previous review, the court stated that "[t]he attorney not only could, but was obligated to, make such disclosure to the court as necessary to withdraw the perjured testimony from the consideration of the jury." 379 F.2d at 761.

135. 106 S. Ct. 988 (1986). The majority opinion was written by Chief Justice Burger who was joined by Justices White, Powell, Rehnquist and O'Connor. The concurring opinion was written by Justice Blackmun and was signed by Justices Brennan, Marshall and Stevens. Justices Brennan and Stevens each wrote short statements explaining why they joined the concurring opinion.

136. 106 S. Ct. at 998.

137. *Id.*

138. *Id.* at 994.

139. *Id.*

140. *Id.* at 995-96.

adopted by the Eighth Circuit.[141] The position in both opinions is that there was no conflict between Whiteside and Robinson in the same sense as the term has been used to describe situations in which an attorney attempts to represent two defendants in a criminal prosecution whose legal interests are contradictory.[142] The Eighth Circuit's contrary assertion was clearly erroneous. Since Whiteside had no legitimate interest in giving perjurious testimony, there could be no "conflict" under the *Strickland* prejudice test between the defendant's desires on this point and the ethical obligations of Robinson to avoid suborning perjury.[143]

On this issue, the conception of the proper role for the criminal defense attorney adopted expressly in the majority opinion, and by implication in the concurrence, is crucial. If the officer of the court role is accepted, as both opinions do, there can never be a conflict between a client and an attorney who is fulfilling that role by preventing the disfigurement of a trial through the introduction of perjured testimony. If the alter ego advocate conception is adopted, as in the opinion of the Eighth Circuit, a disagreement between attorney and client over such a matter can logically be deemed a conflict that seriously impairs the attorney's assistance as counsel.

Pursuing its analysis of this point, the majority notes that the Eighth Circuit's "conflict" decision would have grave consequences for the criminal justice system, since every defendant found guilty could appeal on the ground, real or fanciful, that his or her attorney had not presented the perjurious testimony that the defendant had desired to introduce.[144] The concurring Justices announced an additional reason for the determination of the conflict issue: in their view, dissuading Whiteside from giving perjurious testimony was a reasonable step to protect the defendant's best interests, because the perjury would have been contradicted and, perhaps, detected. This might have led the jury to find him guilty of first degree murder and the judge to enhance his sentence.[145] The concurrence speaks in terms specific to the facts of the case before it, but the points made could be generalized to apply to any situation in which a defendant's proposed perjury would, or might, be detected.

The opinions also agree on a second determination of constitutional doctrine concerning the scope of a defendant's right to testify. Accepting the assumption that the defendant's right to testify in his or her own

141. 106 S. Ct. at 999; *id.* at 1005 (Blackmun, J., concurring).

142. The decision establishing the presumption of prejudice warranting reversal under the *Strickland* formulation is Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). *See supra* note 141.

143. 106 S. Ct. at 999; *id.* at 1005 (Blackmun, J., concurring).

144. *Id.* at 999.

145. *Id.* at 1005 (Blackmun, J., concurring).

behalf is of constitutional dimension, both opinions reject the argument that the right includes the right to commit perjury during the testimony.[146]

On the third issue of constitutional doctrine—whether a defendant's Sixth Amendment right to effective assistance of counsel includes the right to an attorney's aid or passive assistance in committing perjury—the opinions agree that the answer is negative. The majority opinion elaborates on the point, stating that as in the situation in which a defendant "informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury [the defendant] would have no 'right' to insist on counsel's assistance or silence."[147] The concurrence is also definite: ". . . Whiteside had no right to Robinson's help in presenting perjured testimony."[148]

While the majority and concurring opinions agree that Robinson's successful admonitions to Whiteside did not deprive the latter of any constitutionally protected rights, the opinions significantly differ in one major respect. The majority specifically endorses Robinson's performance in giving the admonitions.[149] The concurring opinion, on the other hand, carefully bases its decision for reversal solely on the ground that Whiteside had failed to show that Robinson's admonitions had prejudiced any of the defendant's constitutional rights.[150]

The threat, or statement, by Robinson that he would withdraw from representing Whiteside unless the defendant abandoned his intent to commit perjury was always noncontroversial, and the majority does not discuss this admonition. Robinson's second admonition that he would report the perjury to the court if his client testified falsely is expressly approved by the majority opinion.[151] The opinion endorses the concept

146. *Id.* at 998; *id.* at 1004 (Blackmun, J., concurring). On the right to testify, Blackmun and the signers of the concurring opinion state that the right to testify is protected by the Sixth, Fourteenth, and possibly Fifth Amendments. *Id.* at 1004-05 n.5. The majority opinion does not take this final step, but contains language that seems to imply that the Chief Justice and the other four Justices are ready to accept the implications of previous decisions establishing the right as a constitutionally protected one. *Id.* at 993.

147. *Id.* at 998.

148. *Id.* at 1005 (Blackmun, J., concurring).

149. *Id.* at 998-99.

150. *Id.* at 1006-07 (Blackmun, J., concurring).

151. *Id.* at 998. The majority opinion quotes the language of the MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983) and finds that the comment "suggests that an attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response to the conduct of a client who has actuallly given perjured testimony." 106 S. Ct. at 996. The ABA amicus brief is briefly mentioned and its essence is stated to be "that under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony." *Id.* at 996.

that reporting of client perjury is "professionally responsible and acceptable" on the basis of the commentary to the Model Rules and the American Bar Association's amicus brief filed in the case.[152]

The majority opinion also explicitly deals with the admonition that caused the most difficulty for the Eighth Circuit, that Robinson "probably would be allowed to attempt to impeach that particular [perjured] testimony" of his client Whiteside.[153] The majority treats the admonition as a minor matter, reasonably interpreting it to mean that if Whiteside persisted in his desire to commit perjury, Robinson would withdraw from the case and, if Whiteside then did commit perjury, Robinson would testify as an impeaching witness. To the majority, the idea that Robinson did not imply that he would testify against Whiteside while still representing him removed any concern with the admonition. Others in the profession might not be as sanguine. It might be argued, for instance, that it is a far less dramatic event for an attorney to report to the judge the fact that his client has committed perjury, than for the attorney to testify in open court against his former client. Certainly the Eighth Circuit was of the opinion that this threat adversely and irreparably affected the relationship between Whiteside and his counsel.[154]

On the other hand, the majority obviously considers the threat to testify no more significant than the report admonition. Since the latter is clearly authorized in the majority's view, the former is also. Of course after an attorney reports perjury by a present or former client, the attorney will be sought after by the prosecutor to testify in either a subsequent perjury prosecution, or as an impeachment witness in the action in which the perjury occurs.[155] In most cases, the judge, upon learning of the perjury, will probably declare a mistrial, and the defendant will likely be retried on the original charge. In the second trial, the client could not

152. *Id.* at 996.

153. *Id.* at 997 n.7.

154. Whiteside v. Scurr, 750 F.2d 713, 714 (8th Cir. 1984).

155. On this point, it should be noted that if the attorney who reports the perjury has successfully moved to withdraw from representation prior to the trial in which the perjury occurs, there would be less concern over the attorney's appearance in the trial as witness than if the attorney was originally denied leave to withdraw, represented the client in the trial, reported the client's perjury when it occurred, was allowed to withdraw and *then* testified for the prosecution as an impeaching witness. The strong adverse effect that such a course of events would have on a jury might well lead it not only to disregard the client's perjurious testimony, but also to find *all* facts against the client on the ground that even the client's own attorney had turned against the client. The majority opinion does not consider the variety of situations in which a former attorney might be called upon to testify to impeach a former client. Therefore, it is a likely assumption that the statement of the majority means that the Court has no constitutional reservations about the former attorney impeachment testimony in an action in which the attorney has not previously represented the client before the jury.

bar the former attorney's testimony on the ground of the attorney-client privilege, because the privilege does not apply when the client intends to use the attorney's services to commit a crime.[156]

The crucial difference between the majority and the concurring opinions is that the majority specifically endorses the concept that a criminal defense attorney has a professional duty to report perjury to the court when his or her client commits it.[157] Although the American Bar Association took contrasting positions on the issue in the 1969 Code and the 1974 amendment to DR 7-102(B)(1), the majority opinion notes that the ABA's amicus brief takes the view "that under no circumstances may a lawyer either advocate or passively tolerate a client's giving false testimony."[158] The majority states that reporting a client's perjury "is wholly consistent with . . . the overwhelming majority of courts, and with codes of professional ethics."[159] In view of the language in the 1974 version of DR 7-102(B)(1), the equivocal statements in the comment to Model Rule 3.3, the clear implications of proposed Standard 4-7.7 and the previous disarray of federal circuit courts, the Court's statement is perhaps questionable.[160] However, after *Nix* the way is now cleared for the "remedial measures" command contained in Model Rule 3.3 to be fully operative in all states adopting the recently promulgated Model Rules.

The basic position of the concurring opinion is that the majority should not announce its approval of professional rules that require a criminal defense attorney to report client perjury.[161] There appears to be two grounds for the concurring opinion's objection. The first is that a blanket rule on what constitutes a constitutionally permissible response to a client's intention to commit perjury is an inappropriately broad approach to a question that "is likely to vary from case to case" due to a "complex interaction of factors."[162] The relevant factors mentioned by the concurrence are: the degree of certainty that perjury has occurred or will occur; the stage of the proceedings at which the attorney discovers his or her client's plan to commit perjury; and "the ways in which the attorney may be able to dissuade his client."[163] The concurring Justices believe a blanket rule is inappropriate because it will force attorneys to

156. *Cf.* proposed FED. R. EVID. 503, *supra* note 77.

157. 106 S. Ct. at 995-96 ("[T]he legal profession has accepted that . . . [there is a] special duty of an attorney to prevent and disclose frauds upon the court. . . .").

158. *Id.* at 996.

159. *Id.* at 999 (footnote omitted).

160. *See supra* notes 96-100, 110, 112, 124-134, and accompanying text.

161. 106 S. Ct. at 1000, 1006 (Blackmun, J., concurring).

162. *Id.* at 1006 (Blackmun, J., concurring).

163. *Id.*

function as the judge or jury of their client's story. This, in turn, may deprive the clients "of the zealous and loyal advocacy required by the Sixth Amendment."[164]

The second ground for the objection of the concurring opinion is that only the courts and legislatures of individual states are empowered to make the rules and regulations that govern the practice of law within their borders. Announcements of preferred practice by the Court may therefore constitute "unnecessary federal interference in a State's regulation of its bar."[165] Justice Blackmun and those who joined in the concurring opinion would avoid this interference by deciding the case wholly on the basis that no prejudice under the *Strickland* standard has been shown.[166]

Both grounds of criticism of the majority opinion appear to be ill-founded. As to the "blanket rule" criticism, the majority does not establish a rule forcing state disciplinary bodies to hold that failure to report client perjury is unprofessional conduct. All the majority has said—and all that the United States Supreme Court can say on such matters—is that *if* a state adopts a reporting requirement, as in Model Rule 3.3(a)(4), compliance with that requirement by criminal defense attorneys will not deprive defendants of effective assistance of counsel under the Sixth Amendment. States, and states alone, have the power to enact and enforce such reporting requirements. Secondly, only a "blanket rule", actually a "blanket announcement", by the United States Supreme Court can end the conflict between the federal circuit courts on the question of lawyer response to client perjury and give the states a firm basis for writing disciplinary codes that can be promulgated with certainty of constitutionality.

As to the concurrence's distress over a blanket rule in an area in which a criminal defendant's rights may be prejudiced, it should be borne in mind that in the protracted litigation at bar, *all* of the courts that examined the matter found that Whiteside would have committed perjury had Robinson not given the admonitions he did. Where it is certain, or as certain as possible given court procedures for ascertaining facts, that perjury would occur or has occurred, a reporting requirement does not seem harshly restrictive of the rights of defendants. Finally, the second objection of the concurring opinion, concerning federal interference, is based upon an unspoken premise that state disciplinary bodies will now feel compelled to adopt a reporting requirement because of what the

164. *Id.* at 1006 (footnote omitted).
165. *Id.* at 1006.
166. *Id.*

majority opinion says. But, once again, the only bodies with the power to promulgate and enforce disciplinary rules are the states, not the United States Supreme Court. The majority opinion merely provides a constitutional authorization to the states to require a provision for the reporting of client perjury in their disciplinary codes if states wish to do so.

The short concurring statement by Justice Stevens points out a troubling concern which is raised by the *Nix* decision: the uncertainty of an attorney's determination that his or her client intends to give, or has given, perjurious testimony. In the Justice's words, "[a] lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked."[167] In *Nix*, defense counsel Robinson had a client who contradicted himself at the last moment in a manner indicating a clear fabrication of a new story. Independent investigation produced abundant evidence (three witnesses, a search after the event by police, and counsel's own subsequent search) to convince an unbiased observer that the client's new story was indeed false. What quantum of evidence short of this will be sufficient to trigger procedures that an attorney is directed to take in response to client perjury? Undoubtedly, future cases will raise that question.

B. The Four Procedural Issues

Reviewing both the majority and the concurring opinions on the four controversial procedural issues that arise in connection with the threat of client perjury reveals that *Nix* is indeed a major decision in a previously confused field. On the first issue of when does an attorney have a duty to act, neither opinion goes beyond expressing that the attorney in this case was justified in taking action.

With regard to the admonitions that an attorney can give to dissuade the perjury-intending client, those given by Robinson are now approved by five members of the majority as well as Justice Stevens in his separate statement.[168] Thus, the threat or "admonition with a statement of intent" by the attorney that he or she will (1) withdraw, (2) report perjury if it occurs, and (3) testify to impeach the perjuring defendant after withdrawing, are all constitutionally acceptable. The concurrence

167. *Id.* at 1007 (Stevens, J., concurring).

168. *Id.* at 999; *id.* at 1007 (Stevens, J., concurring).

merely holds that the admonitions Robinson gave do not violate any constitutionally protected right of a client who intended to commit perjury.

On the third issue of what attorney conduct is proper prior to the perjurious testimony if the attorney's request to withdraw is not granted, the concurrence is silent. The majority opinion indicates, at a minimum, that the procedure in Proposed Standard 4-7.7 is constitutional. On this point, it should be recalled that the majority opinion mentioned, without disapproval, the *Curtis* decision, which specifically approved keeping a perjury-intending client off the stand to prevent false testimony. By doing this, the majority may be indicating its constitutional approval of more dramatic and aggressive procedures than those prescribed in Standard 4-7.7.[169]

Lastly, it is clear in both the majority and concurring opinions that an attorney may report the fact that a client or former client has committed perjury after it has occurred. As to testifying against a former client for purposes of impeachment or in a subsequent prosecution, the majority clearly believes it violates no constitutional rights, while the concurrence is silent on the matter.

Conclusion

The *Nix* decision is a major development in the jurisprudence of lawyer ethics. The three issues of constitutional doctrine were decided in a clearcut manner. Three of the four procedural questions for criminal defense attorneys were addressed and definitively answered. These determinations all flow from a firm choice of the proper role to be played by a criminal defense attorney—that of an officer of the court. The importance of the *Nix* decision is indicated by the questions it raises concerning current professional standards and conduct. Those questions are numerous and some are of large significance.

It is now clear that those states that have adopted the 1974 version of DR 7-102(B)(1) are not compelled by constitutional considerations to keep the provision. Furthermore, the cautionary note in the comment to Model Rule 3.3 regarding perjury by a criminal defendant can now be either eliminated or altered to take into account the position of the Court as announced in *Nix*. Finally, those states wishing to experiment with dramatic requirements of attorneys responding to anticipated client perjury, may be encouraged to do so by the majority opinion's seeming acquiescence toward the opinion in *United States v. Curtis*.[170] It is far from

169. The Court mentions United States v. Curtis, 106 S. Ct. at 996 n.6, and 999 n.8. For a discussion of the *Curtis* decision, *see supra* notes 130-132 and accompanying text.

170. *Id. See supra* text accompanying note 169.

certain whether the Court, or even the signers of the majority opinion, would approve the constitutionality of an attorney's decision to keep his or her client off the stand to prevent perjury; but those states that may wish to require such a procedure can be emboldened to do so on the basis of *Nix*.

It is interesting to contemplate in this regard that the time may now be at hand for a division of those rules of professional responsibility, having to do with client perjury, into one set for civil advocates and one set for criminal advocates. Certainly, in civil trials there is no concern with the Sixth Amendment as a technical matter.[171] More importantly, the concern over the force of the state being mustered against the individual that animates our concerns regarding the Sixth Amendment is lacking in most civil litigation. Thus, since the *Nix* decision strongly announces that truth is the goal of the criminal adjudication process and follows this announcement by approving the responses to intended client perjury traced above, it is logical to assume that in civil litigation an attorney's obligation to prevent perjury from occurring in the courtroom will be even stronger. It is therefore quite probable that the Supreme Court would allow for even more dramatic options for civil advocates in response to threatened client perjury.

Considering the options that criminal defense attorneys will now have in determining how to respond to client perjury, along with the fact that states may begin to require dramatic action on the part of attorneys to stop client perjury or else face disciplinary action, the extreme importance of an attorney's determination that his or her client intends to commit perjury on the stand becomes clear. As stated above, Justice Stevens is perceptive in pointing out the nature of the problem and the fact that it will undoubtedly present difficulties in this area for years to come.[172] One commentator, writing after the Eighth Circuit *Whiteside v. Scurr* decision, suggested an elaborate form of judicial hearing in which only the defendant and his or her counsel, the judge and a court reporter would be present for the purpose of determining if counsel's belief that

171. However, the Supreme Court has held that in certain civil cases involving government benefit denials, the claimant has a right under the Due Process Clause to be represented by counsel retained and paid by the claimant. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 270 (1970). Several circuit courts have also held that the Due Process Clause establishes a right to access to and representation by privately retained counsel in a civil matter. *See* American Airway Charters, Inc. v. Regan, 746 F.2d 865, 873-74 (D.C. Cir. 1984); Mosley v. St. Louis Southwestern Ry., 634 F.2d 942, 945 (5th Cir. 1981); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118-19 (5th Cir. 1980).

172. *See supra* text accompanying note 167.

the defendant intends to commit perjury is well-founded.[173] The procedure suggested would be useful to criminal defense attorneys, but would burden already overworked criminal trial court judges. For this reason, it is unlikely that the suggested procedure will be adopted on a large scale.

It seems clear that *Nix* requires that the legal profession should take steps to assure that criminal defendants are aware of the duties of counsel in regard to client perjury. The author assumes that Professor Freedman's well known statements about the standard practice of criminal defense attorneys to present perjured testimony of a client is at least partly true in many jurisdictions.[174] Therefore, following *Nix*, criminal defendant clients should receive a statement from their attorneys to the effect that, if the jurisdiction imposes such a rule as a matter of professional responsibility, the attorney has a duty to report perjury if it is committed by the client or by any witness. Such a warning can be structured to reassure the defendant to the greatest possible extent that the attorney will give a full and vigorous defense, but that no perjury will be allowed to go unreported to the court.[175]

The giving of warnings or statements at the outset of an attorney-client relationship, particularly when the counsel is one that is provided by the state, may be difficult for the criminal defense bar to adjust to. However, Professor Freedman tells us that this is the practice in Canada.[176] A dramatic change of this type in the initial contact between a criminal defense attorney and his or her client seems required by *Nix*, and is at least in keeping with the dramatic sweep of the Court's work in the *Nix* decision itself.

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173. *See* Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121 (1985).

174. Professor Freedman reports the results of a District of Columbia survey which found that ninety-five percent of the attorneys surveyed would call a perjury-intending client to the stand and ninety percent would question the perjury-intending client in the normal manner. *Lawyer's Trilemma, supra* note 8, at 29.

175. A suggested statement is: "As your attorney I will present any and all truthful evidence in your behalf at the trial in your case, but I cannot present any testimony or other evidence that I am convinced is not true. If I am convinced that anyone has actually committed perjury or presented false evidence at the trial, I must immediately report that fact to the court."

176. *Lawyer's Trilemma, supra* note 8, at 29. For a more complete discussion, see Lefstein, *supra* note 10, at 688.